Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

DR. CHIJIOKE VICTOR OKORO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Where a Defendant has committed a crime after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and he is tried and convicted before issuance of the remedial opinion in *U.S. v. Booker*, 543 U.S 220 (2005), does retroactive application of the remedial portion of the *Booker* opinion to the Defendant's sentence impermissibly subject him to the risk of increased punishment for his crimes, in violation of the *ex post facto* provisions of the United States Constitution and this Court's opinion in *Bouie v. Columbia*, 378 U.S. 347 (1964)?

2) Where a district court sentences a Defendant without articulating the rationale behind its analysis of the factors set forth in 18 U.S.C. § 3553, and the district court's comments at sentencing demonstrate that it only considered the severity of the crime in rendering its sentence, is the resultant Guidelines sentence entitled to a presumption of reasonableness?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit from which Dr. Okoro seeks this *Petition* is unreported. It is contained at Appendix A (pages 1a-13a) hereto. The previous decision for the United States Court of Appeals for the Fifth Circuit, which remanded this case to the district court for reconsideration in light of this Court's opinion in *U.S. v. Booker*, 543 U.S. 220 (2005), is reported at *U.S. v. Akpan*, 407 F.3d 360 (5th Cir. 2005). It is contained at Appendix "B" (pages 14a-30a) hereto. All citations to either opinion in this *Petition* will be referred to as "Appx. ___".

BASIS OF JURISDICTION

In February of 2002, the grand jury for the United States District Court for the Southern District of Texas indicted Dr. Victor Okor on fifteen (15) counts of aiding and abetting mail fraud, three (3) counts of filing false income tax returns, and seven (7) counts of healthcare fraud. A jury found Dr. Okoro guilty on all counts. On September 2, 2003, the District Court sentenced Dr. Okoro to serve one hundred twenty (120) months for the healthcare fraud counts, thirty-one (31) months consecutively for the tax fraud counts, and sixty (60) months concurrently for the mail fraud counts. Dr. Okoro timely noticed his appeal of this conviction and sentence on September 11, 2003.

In that initial appeal, the United States Court of Appeals for the Fifth Circuit affirmed Dr. Okoro's conviction on all counts. It nevertheless reversed the sentence given Dr. Okoro because Dr. Okoro had properly preserved his *Apprendi/ Blakely/Booker* objection in the District Court and the Government could not demonstrate that the *Apprendi/*

Blakely/Booker error was harmless beyond a reasonable doubt. *See* Appendix 25a-26a. The Fifth Circuit remanded the case to the District Court for resentencing in light of *U.S. v. Booker.*

On August 15, 2005, the District Court sentenced Okoro to the same term of incarceration as it had on original sentencing. Okoro timely appealed that sentence by notice filed on August 23, 2005. The Fifth Circuit affirmed that sentence by opinion dated January 16, 2007. *See* Appendix "B". Pursuant to 28 U.S.C. § 1254(1), Dr. Okoro now invokes this Court's jurisdiction to review the final judgment of the Fifth Circuit Court of Appeals.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The *Ex Post Facto* Clause of the United States Constitution states that "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. Art. I, § 9, cl. 3.

18 U.S.C. § 3553(a) states, in relevant part:

> (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such

guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress

(regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

I. Factual Background.

Doctor Okoro is a native of Nigeria who came to the United States to attend college and medical school in the 1970s. Following his graduation from medical school, Okoro practiced medicine in this country from 1981 until 2001. Okoro also developed a medical missionary program to bring desperately needed medical care to his native Nigeria. Between 1984 and 2000, Okoro traveled to Nigeria twice a year to personally provide medical care to impoverished Nigerians.

In 1989, Okoro moved to Houston, Texas to work as an emergency room doctor at Memorial Hospital Northwest. He

was eventually promoted to Director of the Emergency Department. Okoro held this position until his arrest in 2001. Neither his arrest nor subsequent conviction was in any way related to Okoro's job performance at Memorial Hospital. In 1999, Okoro proudly became a United States citizen.

Okoro also worked with various physical therapy clinics within the Houston area. These physical therapy clinics sought reimbursement from Medicare and private insurance companies for the services these clinics provided to patients. It was Okoro's involvement with these clinics which led to his indictment on criminal charges.

II. Procedural History.

Following a jury trial, Doctor Okoro was convicted of fifteen counts of mail fraud in violation of 18 U.S.C. § 1341, three counts of filing false tax returns in violation of 26 U.S.C. § 7206 (1), and seven counts of healthcare fraud in violation of 18 U.S.C. § 1347, all arising out of his practice with the Houston physical therapy clinics noted above. Okoro was later sentenced to a total of 151 months imprisonment by the District Court.

Okoro appealed his convictions and sentence. The Fifth Circuit affirmed Okoro's convictions but vacated his sentence in light of the opinion issued by this Court in *U.S. v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). *See U.S. v. Akpan*, 407 F.3d 360, 378 (5th Cir. 2005). The Fifth Circuit specifically noted that Okoro had preserved his *Apprendi* error and was thus entitled to harmless error—as opposed to plain error—review of that objection. *Id.*

On August 15, 2005, the District Court convened to re-sentence Okoro in accordance with the mandate of the Fifth Circuit. During the hearing, undersigned counsel attempted to argue that the District Court should, in imposing a reasonable sentence as required under *Booker*, consider the fact that Okoro had made valuable contributions to the medical community through his work as a doctor in both the United States and abroad. This was extremely significant since the Fifth Circuit had previously highlighted Okoro's charitable work and considered it in possible mitigation of his crime. *See* Appx. 15a, 26a. When reminded that the Fifth Circuit had specifically documented Okoro's charitable activities, the District Court retorted, "if you want them to find the facts, then go back and let them sentence him, and you apparently want to rely on fact-finding about his charitable activities on the Court of Appeals and not let me find facts." The District Court made its disdain for both Okoro and the Fifth Circuit's prior ruling clear by stating, "I'm not going to sit by and let some 26-year-old in the basement of 500 Camp Street [the Fifth Circuit building is actually at 600 Camp Street] tell me that I should consider the good he has done. I am considering the good. It just doesn't exist." The District Court went on to express his disdain of Okoro by stating that "if I were doing it over today, I would sentence you much more harshly."

Counsel for Okoro also attempted to argue that the District Court could not consider any unadjudicated conduct to enhance Okoro's base offense level under the Guidelines. This argument was rejected by the District Court, which adopted the conclusions it had reached at Okoro's original sentencing, and enhanced Okoro's base offense level by twenty-six levels based upon the following unadjudicated conduct:

1. 14 levels for the total loss (5 to 10 million) attributed to the conduct;

2. 4 levels for deriving more than one million dollars from financial institutions;

3. 4 levels for being a leader/organizer of criminal activity;

4. 2 levels for more than minimal planning; and

5. 2 levels for abusing his position of trust.

Counsel for Okoro also argued for the imposition of concurrent rather than consecutive sentences. The District Court rejected this argument and imposed a 31 month sentence for tax fraud to run consecutive to the 120 month sentence for mail and healthcare fraud. Thus, Okoro was again sentenced to a total of 151 months imprisonment, which is the exact same sentence which formed the basis of Okoro's original appeal.

On appeal of the newly-entered sentence, Okoro argued that the District Court had given improper weight to the gravity of Okoro's offense and had given insufficient weight to the charitable and other mitigating factors highlighted by the Fifth Circuit on original appeal. Okoro further argued that, because the remedial opinion in *Booker* permitted judicial fact finding in a manner that would place him at greater risk for prolonged incarceration, application of that portion of *Booker* violated the *Ex Post Facto Clause*. The Fifth Circuit rejected the latter argument without comment. *See* Appx. 13a. As to the former argument, the lower court conflated the *factual* issue of the credibility of Okoro's claims

of charitable contribution with the *legal* issue of whether the District Court properly applied and weighted all § 3553 factors in reaching Okoro's sentence:

> By refusing to credit Okoro with his alleged charity work, the District Court has made a credibility determination to which this Court gives deference. *See United States v. Perez*, 217 F.3d 323, 331-32 (5th Cir. 2000). Further, in imposing a Guideline sentence, the District Court is presumed to have considered the § 3553 factors, and the sentence itself is entitled to a presumption of reasonableness. *Mares*, 402 F.3d at 519-20; *United States v. Alonzo*, 435 F.3d 551, 553-54 (5th Cir. 2005). Okoro has failed to rebut this presumption and we find that the sentence was reasonable.

Appx. 12a (footnote omitted). It therefore affirmed the District Court sentence by applying the presumption of reasonableness to that Guideline sentence, despite the fact that the district failed utterly to comply with § 3553 in reaching that sentence. This *Petition* follows that decision.

REASONS FOR GRANTING THE PETITION

This case presents two (2) significant issues currently left unclear in the wake of this Court's *Booker* decision. Initially, the case asks whether application of the remedial portion of *Booker* results in an *ex post facto* application of a harsher penalty law, where the retroactive application of that aspect subjects the Defendant to the potential for sentencing enhancements unconstitutional under *Booker* and impermissible under the mandatory Guidelines regime. The case further inquires into the same dilemma presented to this Court in *Rita v. U.S.*, No. 06-5754—is a Guidelines sentence afforded a presumption of reasonableness even where the District Court failed to articulate its § 3553 analysis and—in the analysis it did give, improperly weighted one (1) of the § 3553 factors, to the exclusion of all others? This Court should grant the instant *Petition* and either consider the *ex post facto* issue or remand the case for reconsideration once it has issued its *Rita* opinion.

I. The Lower Courts' Application Of The Remedial Portion Of *Booker* Violated The *Ex Post Facto* Clause.

Dr. Okoro committed all of the conduct underlying these charges prior to this Court's decision in *Booker* but after this Court's *Apprendi* decision. Under the mandatory Guidelines regime in effect after *Apprendi*, Okoro should have been sentenced to a Guidelines sentence, but one that could only be constitutionally sustained by limiting enhancement of the sentence to those grounds for enhancement found by the jury adjudicating Okoro's guilt. *See Booker*, 543 U.S. at 237; *Apprendi*, 530 U.S. at 490-491. Okoro's post-*Booker* sentence instead exposed him to the worst of both worlds—although the Guidelines had been rendered advisory by the remedial *Booker* opinion, the Court's decision in *Booker*

permitted the District Court broader discretion in exercising judicial fact-finding as to the enhancement to Okoro's sentence. *Compare*, *Booker*, 543 U.S. at 248-249. Dr. Okoro could not constitutionally be subjected to this harsher sentencing regime in accordance with his rights against punishment by *ex post facto* laws.

In *Bouie v. Columbia*, 378 U.S. 347 (1964), this Court penned the seminal decision applying the *Ex Post Facto Clause* of the United States Constitution to the infliction of criminal punishment. The Court began its analysis with the notion that all crimes must be of sufficiently clear definition that they give fair warning to those contemplating in engaging in the conduct the statute proscribes. *Id.* at 351. The Court ultimately held that:

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce v. United States*, 314 U.S. 306, 311, "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

Id. at 352. Expansion of a criminal statute to include conduct not previously considered criminal inevitably renders the statute an *ex post facto* and unconstitutional application of criminal law.

Bouie stands for the essential proposition that the sovereign cannot retroactively criminalize previously non-

criminal conduct *or* enhance the penalty for conduct previously left non-penal. "One function of the *Ex Post Facto* Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission." *Garner v. Jones*, 529 U.S. 244, 249 (2000). *See also Collins v. Youngblood*, 497 U.S. 37, 42 (1990). Although courts interpreting the *ex post facto* implications of applying the remedial portion of *Booker* have focused on the notice aspect of the due process analysis, the reality is that the proscription against *ex post facto* increases in punishment does not hinge on whether or not the Defendant could or did have notice of the new proscription. "The constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, *see Malloy v. South Carolina*, 237 U.S. 180, 183, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Dobbert v. Florida*, 423 U.S. 282, 293 (1977). It is "arbitrary and oppressive" to create a new penalty for a crime that did not exist at the time of the crime's commission. Notice does not factor into this equation at all—fundamental fairness, and the right to be punished in accordance with the same principles as others convicted of the same crime at the same time, is the driving factor behind the analysis.

To apply the remedial portion of *Booker* to Defendants like Okoro inevitably violates the *Ex Post Facto* Clause. Under *Apprendi*, and as clarified in *Ring v. Arizona*, 536 U.S. 584 (2002), the right to be sentenced based solely on the facts of guilt as found by a jury "is implicated whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict or admitted by the defendant. *Booker*, 534 U.S. at 232. Furthermore, the "statutory" maximum for purposes of this analysis is not the maximum sentence prescribed by the United States Criminal Code.

Instead, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge *may* impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 231 (emphasis in original). Thus, under the Mandatory Guideline regime *as it existed before the remedial portion of Booker*, the District Court lacked constitutional authority to sentence Okoro using any enhancements other than those found by a jury. Under the remedial provision of *Booker*, however, the District Court is free to conduct its own fact finding and enhance the Defendant's sentence without regard to the essential jury findings. This result significantly impacted Okoro—while the jury found the total loss in this case to be $525,191.47, the trial court unilaterally found the loss to be between $5-10 million, a disparity in loss that caused a four-level increase in Okoro's Base Offense Level above that available under the jury verdict. The Court further enhanced Okoro's sentence an additional twelve (12) levels based on enhancements derived from judge-made facts *never* determined by a jury.[1] Because these adjustments and enhancements were unconstitutional and unavailable pre-*Booker*, but are available under the post-*Booker* advisory regime, the retroactive application of the *Booker* advisory scheme to Okoro violates the *Ex Post Facto* Clause.

It is true that the Courts of Appeals have—virtually uniformly—held that retroactive application of *Booker*'s remedy section does not violate the *Ex Post Facto* Clause. *See, e.g., United States v. Pennavaria*, 445 F.3d 720, 724 (3d Cir. 2006); *U.S. v. Charon*, 442 F.3d 881 (5th Cir. 2006);

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1. Okoro specifically objected to these enhancements and adjustments on original sentencing and thus preserved his *Apprendi* objection for the record.

United States v. Lata, 415 F.3d 107 (1st Cir. 2005); *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005); *United States v. Jamison*, 416 F.3d 538 (7th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297 (11th Cir. 2005). Yet these courts, with all due respect, miss the point. At the core of these opinions is the notion that the *ex post facto* proscription rests on "core concepts of notice, foreseeability, and, in particular, the right to fair warning." *U.S. v. Faircloth*, 439 F.3d 76, 78 (2d Cir. 2006). Courts adopting this approach inevitably reach the conclusion that each defendant "had fair warning that his conduct was criminal, that enhancements or upward departures could be applied to his sentence under the Guidelines based on judicial fact-findings, and that he could be sentenced as high as the statutory maximum." *Id.* at 79. Therein lies the problem.

As *Booker* makes clear, the regime extant from *Apprendi* and *Ring* held that *any* enhancement of penalty based on non-jury fact finding intruded on the Sixth Amendment rights of a criminal defendant. Thus, any sentence based on such judicial fact finding would be void *ab initio* pre-*Booker* but constitutionally permissible under the post-*Booker* advisory regime. Worse yet, the term "statutory maximum" does not mean the maximum sentence prescribed under the Criminal Code. Instead, it simply means the enhancement available under the extant sentencing regime which, prior to *Booker*, was the *mandatory* Guidelines regime. *See Booker*, 543 U.S. 232-233. Thus, a Defendant prior to *Booker* knew or should have known that the *Guidelines sentence* was the highest available absent extraordinary circumstances *and* that the District Court could only constitutionally calculate that sentence based on facts found by a jury. Under the advisory scheme, with unbridled judicial fact finding and open-ended penalties, the notice of available penalties given the

Defendant pre-*Booker* does not comport with those available post-*Booker*.

The time has now come for the Court to clarify the confusion extant below concerning the application of the *Ex Post Facto* Clause to the remedial portion of the *Booker* opinion. The increasing number of opinions in the lower courts demonstrate both the recurring nature of this problem and the maturation point reached by the jurisprudence concerning the issue. This Court should now intervene and issue a definitive opinion making uniform the treatment of the issue throughout the land.

II. The Fifth Circuit Impermissibly Afforded The District Court Within-Guidelines Sentence A Presumption Of Reasonableness *Although* The District Court Failed To Comply With The Dictates Of 18 U.S.C. § 3553.

This Court is currently considering the case of *Rita v. U.S.*. That case will ultimately determine the extent to which, and under what circumstances, a Guidelines sentence should be afforded a presumption of reasonableness.[2] The instant case presents precisely the same question in exactly the same context. The trial court herein failed to articulate the § 3553 factors it considered in reaching its ultimate sentence. Furthermore, what analysis it did give underscored the fact that it sentenced Okoro based solely on the severity of the offense factor to the exclusion of all others. Because the Fifth Circuit nevertheless afforded the District Court's sentence a presumption of reasonableness, it committed the same error

2. Briefing has been completed in *Rita* and argument took place on February 20, 2007.

as did the Court of Appeals in *Rita*, and the Court should remand this case for reconsideration once it issues its opinion in *Rita*.

Regardless of whether the Court ultimately decides that properly rendered Guidelines sentences merit a presumption of reasonableness, it should nevertheless remain without cavil that even a Guidelines sentence requires some supporting analysis in order to be presumed reasonable. *See generally*, *U.S. v. Jackson*, 408 F.3d 302, 305 (6th Cir. 2006)("we as an appellate court must still have the articulation of the reasons the District Court reached the sentence ultimately imposed"); *U.S. v. Repking*, 467 F.3d 1091, 1095 (7th Cir. 2006) ("Although a sentencing court need not comprehensively analyze all of the § 3553(a) factors, the judge must at least articulate the factors that determined the sentence that he has decided to impose"); *U.S. v. Sanchez-Juarez*, 446 F.3d 1109, 1115 (10th Cir. 2006); *U.S. v. Martin*, 2006 U.S.App.Lexis 27536 at *5 (11th Cir.)("both before and after *Booker*, we have disapproved the imposition of sentences with no consideration or mention of the § 3553(a) factors.") The Fifth Circuit has taken a different tack—and thus created conflict within the circuits—by adopting the policy that "little explanation is required" where a court sentences a Defendant within the calculable Guidelines range. *See U.S. v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005). Yet, that analysis does itself give improper weight to 18 U.S.C. § 3553(a)(4)—the applicable Guideline Range—and presumes that a Court need consider few, if any other, § 3553 factors so long as it hews its calculations within the applicable Range. It further makes the Guidelines themselves virtually mandatory in a manner recognized as unconstitutional by this Court's *Booker* opinion. *See Booker*, 543 U.S. at 245. Finally, it conflicts with the plain language of the Sentencing Reform Act that

compels a sentencing court to "consider" all relevant § 3553 factors and then issue an articulated basis for its resultant sentence. *See* 18 U.S.C. § 3553(c).[3] A sentence rendered—without an articulation of the § 3553 factors behind it is procedurally unreasonable, and should be afforded neither a presumption nor a conclusion of reasonableness.

Furthermore, where the analysis of a sentencing judge improperly weights one (1) prong of the § 3553 analysis, the resultant sentence is substantively unreasonable. A reasonable sentence is one that takes *all* of the § 3553 factors into consideration when reaching the ultimate term of imprisonment, without giving any excessive weight to any one (1) individual factor to the exclusion of all others. *See generally, U.S. v. Smith*, 474 F.3d 888, 894 (6th Cir. 2007)(emphasis added)("A sentence will fail to be substantively reasonable if the District Court selects the sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent § 3553(a) factors *or gives an unreasonable amount of weight to any pertinent factor*"); *U.S. v. Poole*, 474 F.3d 1127, 1129 (11th Cir. 2007); *United States v. Cooper*, 437 F.3d 324, 329-30 (3rd Cir. 2006); *U.S. v. Haack*, 403 F.3d 997, 1002-03 (8th Cir. 2005). A sentence that does not equally weigh the relevant factors is substantively unreasonable. This is particularly troublesome where a District Court weights *aggravating* factors contained in § 3553 without taking into account relevant *mitigating* factors that would reduce the sentence accorded a particular

3. Because this Court is currently considering these issues in *Rita*, this *Petition* merely underscores the basic arguments now before the Court concerning the presumption of reasonableness and its effect. For a full analysis of these issues, Petitioner refers the Court to the *Original Brief of Victor Rita*, filed on December 18, 2006 in No. 06-5754.

defendant. The rule of parsimony erected by § 3553 "requires the Court to impose the least severe sentence necessary to satisfy the four purposes of sentencing — punishment, deterrence, protection of the public and rehabilitation." *U.S. v. Cull*, 446 F. Supp. 2d 961 (E.D. Wis. 2006). *Accord U.S. v. Ferguson*, 456 F.3d 660, 668 (6th Cir. 2006)("the District Court twice quoted this so-called 'parsimony provision,' which this Court has highlighted as the guidepost for sentencing decisions post-Booker"); *U.S. v. Jiminez-Beltre*, 440 F.3d 514, 526 n. 8 (1st Cir. 2006). A District Court highlighting aggravating factors to the exclusion of relevant mitigating factors necessarily violates the rule of parsimony and renders a sentence that is substantively unreasonable.

In the instant case, the trial court committed both of these vices. It initially failed to provide any real articulation of the analysis it conducted—pursuant to 18 U.S.C. § 3553—of the factors it used to determine Dr. Okoro's sentence. The trial court's only "analysis" of those factors derived from its visceral analysis of the perceived heinousness of Dr. Okoro's crime and the District Court's desire to inflict maximum punishment on all such offenders. Thus, the trial court record is pellucidly clear that the trial court conducted an incomplete analysis of the relevant sentencing factors *and* that what analysis it did undertake resulted in a substantively unreasonable sentence. This case, therefore, presents the type of pristine factual situation that will permit the Court to analyze the legal question of whether an appellate court should accord a presumption of reasonableness to sentences arrived at in this fashion.

This case would present the perfect vehicle for review of the presumption of reasonableness issue before this Court. Yet, the Court is already considering these issues in *Rita* and

Petitioner believes that the Court will ultimately resolve these issues in that case. Therefore, Petitioner suggests that the most prudent course would be to hold this *Petition* pending the Court's decision in *Rita*, and then to remand the case to the Fifth Circuit for reconsideration in light of the Court's *Rita* decision.

CONCLUSION

For the foregoing reasons, Dr. Chijioke Victor Okoro respectfully moves this Court to grant this Petition for Writ of Certiorari and to either consider the issues presented herein or to remand the case to the Court of Appeals for reconsideration once this Court renders its opinion in *Rita v. U.S.*, 06-5754.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 16, 2007

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-20746

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHIJIOKE VICTOR OKORO, also known as Victor Okoro, also known as Chiji V. Okoro,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

(4:01-CR-399-01)

Before BARKSDALE, DeMOSS, and PRADO, Circuit Judges.

PER CURIAM:*

Chijioke Victor Okoro ("Okoro") appeals the district court's sentence for his mail fraud, healthcare

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

fraud, and tax fraud convictions. Okoro claims several points of error: (1) that his post-*Booker* sentence was not "reasonable"; (2) that the district court erred by sentencing him based on facts not found by a jury or admitted by him; (3) that the district court erred in calculating the loss attributable to him; and (4) that the district court erred by imposing consecutive sentences on his tax fraud and healthcare fraud convictions. For the reasons stated below, we affirm.

I.

This Court previously has had the opportunity to discuss the factual background of this case at some length in *United States v. Akpan*, 407 F.3d 360, 362-65 (5th Cir. 2005). We quote from that well-written opinion:

> Doctor Okoro is a native of Nigeria who came to the United States to attend college in the 1970s. He received an undergraduate degree in chemistry and graduated from medical school. As a licensed physician, Okoro practiced medicine in the United States from 1981 until 2002. He also developed a medical missionary program to bring medical care to his native Nigeria. Between 1984 and 2000, Okoro traveled to Nigeria twice a year to provide medical care to impoverished Nigerians. In 1989, Okoro moved to Houston, Texas to work as an emergency room doctor at Memorial Hospital Northwest ("Memorial"). In 1990, Memorial promoted him to the Director of

the Emergency Department, a position that he held until his arrest. In 1999, Okoro became a United States citizen.

A. Mail Fraud

Okoro also worked for the Westchase Clinic ("Westchase") until it closed in 1995, when he began work for Westchase's successor, Spectrum Medical Clinic ("Spectrum"). Okoro and Akpan worked together at both Westchase and Spectrum. In 1996, Spectrum was dissolved and became Houston Medcare ("Medcare"), a minor injury clinic owned by Okoro. Many of Spectrum's employees joined Okoro at Medcare. Most importantly, Okoro hired Akpan as Medcare's administrator to work with lawyers and insurance company representatives to ensure that the clinic received payment for the services that it rendered. Akpan coordinated the transfer of patients from Spectrum to Medcare and also supervised Spectrum's office staff.

In March 1996, the Federal Bureau of Investigation ("FBI"), the Internal Revenue Service ("IRS"), and the United States Department of Health and Human Services ("DHHS") began to investigate attorneys and physicians suspected of submitting false claims to insurance companies for non-existent medical services purportedly provided to victims of motor vehicle accidents. The results of the undercover

investigation by FBI Special Agent Lorraine Tucker and Houston Police Officer Sheryl Jefferson reveals the fraudulent scheme alleged by the government in the indictment against Okoro and Akpan.

Tucker (posing as "Lorraine Bell") and Jefferson (posing as "Sheryl King") took out insurance policies under their aliases in cooperation with representatives of the United Services Automobile Association ("USAA").FN3 They then filed a fictitious accident report that listed Jefferson as the driver.

FN3. For ease of comprehension, we refer to Tucker and Jefferson by their real names.

Tucker received a phone call on her undercover telephone from an individual who identified herself as Cindy Halla, allegedly a representative of a Christian organization called Sisters of Grace. Halla informed Tucker that the Sisters of Grace provided transportation and referrals for victims of car accidents. Halla's associate, Walter Oji, picked up Tucker at her undercover apartment and took her to Spectrum, which was then still in operation. Tucker wore a hidden recording device during this first visit to Spectrum. When they arrived at the clinic, a Spectrum employee gave Tucker some paperwork to complete. She filled it out and gave it to Oji, who then gave it to the receptionist.

Appendix A

Claudia Ramon, a Spectrum nurse, led Tucker to the back of the clinic, where Ramon recorded Tucker's height, weight, and blood pressure and told her that a doctor would be in to see her shortly. Dr. Sunil Vachhani, a licensed chiropractor employed by Okoro, examined Tucker. She informed him that her right shoulder hurt. Dr. Vachhani recommended that Tucker receive physical therapy, but she received none during her first visit. After Dr. Vachhani examined Tucker, Oji took her to the law offices of Gabriel Giwa, whom she retained to recover payment from USAA for the injuries that she had received in the purported car accident.

Oji again transported Tucker to Spectrum in late March 1996. Tucker asked Oji if she should sign in for Jefferson as well, and Oji informed her that she could if she wanted. Tucker wrote both of their undercover names on the sign-in sheet. Ramon led Tucker to an examination room, where she handed Tucker a sheet of yellow paper that contained multiple dates. Ramon asked Tucker to record the dates in her patient file. Tucker then signed the daily sign-in sheets for the month of March, as well as the daily sign-in sheets for all of the days listed on the yellow paper.

Tucker told Ramon that her roommate Jefferson had been in the same accident but

that Jefferson was out of town. Ramon told Tucker that she would speak to her superior about Jefferson. Ramon then introduced Tucker to Akpan, to whom Tucker spoke about Jefferson. Akpan told her that "he would work something out" and would contact their attorney.

In April 1996, Tucker returned to Spectrum by herself. She signed in as usual, and Ramon again gave her a sheet of paper that contained multiple dates. Tucker recorded the dates into her patient file and signed her name on the corresponding daily sign-in sheets. Ramon told Tucker to bring Jefferson with her on her next visit.

On May 1 and 9, 1996, Tucker returned to Spectrum with Jefferson. During the May 9 visit, Tucker and Jefferson met with Akpan. When he asked Jefferson why she had not visited Spectrum earlier, she explained that she had been out of town. Akpan told them that he would help them but that they should not tell others, explaining that car accident lawsuits often settled and that problems arose when the lawyers distributed the settlement funds. Akpan also told them that patients often denied the amount of services that they received at the clinic to avoid payment. Akpan explained that he would get his money and asked if they "were all together on that." Tucker and Jefferson assured him that they were. At the close of the meeting, Ramon provided both Tucker

and Jefferson with more sign-in sheets for multiple future dates, which they signed.

Spectrum ultimately billed USAA $1550 for services rendered to Tucker, claiming 27 physical therapy treatments from March 20 to May 9, 1996. Spectrum also billed USAA $3190 for Jefferson's medical treatment, also for 27 visits between March 20 and May 9, 1996, with multiple treatments rendered on the same day. Okoro's signature appeared on much of the paperwork, even though Okoro had never examined either Tucker or Jefferson. In fact, neither Tucker nor Jefferson had ever even met Okoro.

The "sign-in" scheme was replicated with many of the clinic's patients-Minh Nguyen, Audrey Santos, Simon Mosongo, Yolanda Coleman, Rebecca Whitfield, Dexter Hall, Iyomo Louison, Lora Goree, Halane Dunn, and Manuel Roth. Although some of the patients received physical therapy treatments and some were examined by Okoro, each patient signed blank sign-in sheets and blank patient forms. In addition, Okoro signed most of the forms himself, yet many of the patients testified that he had never examined them, and the evidence at trial demonstrated that he was out of the country-in Nigeria-during many of their "visits."

Appendix A

B. Healthcare Fraud FN4

FN4. Okoro does not appeal his conviction for tax fraud.

Okoro also worked with 21 other physical therapy clinics. Medicare issues a group number to each health care facility and an individual provider number to physicians within the facility. Physicians must complete a "reassignment of benefits" application to allow the facility to bill Medicare for the physician's services. Medicare then reimburses the facility under the physician's provider number. The facility may bill Medicare for services that the physician renders only when he is present.

Between 1998 and 2000, Okoro received individual provider numbers in connection with 21 physical therapy clinics. These clinics were owned by Akpan, Sekibo Williams, a foreign medical student who worked at Medcare, and Henry Johnson, Spectrum's previous owner. In total, the clinics billed Medicare $9,788,724.76, and Medicare paid a total amount of $4,192,544.16 to the clinics. Of this amount, Okoro received $324,373.87 from the clinics between 1999 and 2001.

The evidence at trial demonstrated that many of the physical therapy clinics billed

> Medicare for services that Okoro allegedly rendered after he deactivated his individual provider number for that clinic. In addition, Okoro signed patient documents that stated that he had treated those patients on specific dates and at specific times on which Okoro could not possibly have rendered services. For example, many of the dates on which Okoro alleged that he provided services were dates when he was in Nigeria.

Id.

In February 2002, a grand jury indicted Okoro on fifteen counts of aiding and abetting mail fraud, in violation of 18 U.S.C. §§ 1341 and 1342; three counts of filing false income tax returns, in violation of 26 U.S.C. § 7206(1); and seven counts of healthcare fraud, in violation of 18 U.S.C. § 1347. Following trial, a jury found Okoro guilty on all counts.

Prior to the issuance of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the district court sentenced Okoro to 151 months in prison: 120 months for the healthcare fraud counts, 31 months (consecutive) for the tax fraud counts, and 60 months (concurrent) for the mail fraud counts.[2] The 151-month sentence was the highest allowed under the Guidelines.

Okoro appealed his conviction and sentence and this Court upheld the conviction but remanded the

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2. Sixty months was the statutory maximum penalty for violations of 18 U.S.C. § 1341 in 2000.

pre- *Booker* sentence because the Government could not prove that the sentence would have been the same under a non-mandatory Guideline regime. *Akpan*, 407 F.3d at 377. At re-sentencing, the district court imposed the same 151-month sentence and Okoro timely appealed to this Court.

II.

A.

After *Booker*, we ultimately review sentences for reasonableness. *See Booker*, 543 U.S. at 261-62; *United States v. Smith*, 440 F.3d 704, 706 (5th Cir. 2006). We review the district court's interpretation and application of the Sentencing Guidelines de novo and its factual findings for clear error. *Smith*, 440 F.3d at 706; *United States v. Villanueva*, 408 F.3d 193, 203 n. 9 (5th Cir.), *cert. denied*, __ U.S. __, 126 S.Ct. 268, 163 L.Ed.2d 241 (2005).

Booker mandates that sentencing courts consider the factors set forth in 18 U.S.C. § 3553(a), and we review the court's application of those factors in determining whether a sentence is reasonable. *See United States v. Mares*, 402 F.3d 511, 518-19 (5th Cir.), *cert. denied*, __ U.S. __, 126 S.Ct. 43, 163 L.Ed.2d 76 (2005). Section 3553(a) requires the district court to consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed-

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) [the relevant Guideline range];

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission. . . .;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

Okoro claims that the district court erred by failing to consider his "history and characteristics" as required by § 3553(a)(1), and therefore, his sentence is unreasonable. In particular, Okoro argues that the court refused to consider his "valuable charitable contributions to society through his legitimate medical practice and through his [medical] missionary work to impoverished Nigerians." Okoro points out this Court previously acknowledged his medical career in Houston and his travels to Nigeria to provide medical care. *Akpan*, 407 F.3d at 363.

However, even a cursory review of the sentencing transcript reveals that the district court considered Okoro's history and characteristics. The transcript indicates the court examined Okoro's alleged charitable medical work in Nigeria and ruled that it was a fraud. The court noted that Okoro continued to bill Medicare and insurance companies for patients he falsely claimed to have treated in Houston during his trips, and that the government (through Medicare) and the medically insured (through their insurance premiums) were paying for Okoro's trips to Nigeria.

By refusing to credit Okoro with his alleged charity work, the district court has made a credibility determination to which this Court gives deference. *See United States v. Perez*, 217 F.3d 323, 331-32 (5th

Cir. 2000). Further, in imposing a Guideline sentence,[3] the district court is presumed to have considered the § 3553 factors, and the sentence itself is entitled to a presumption of reasonableness. *Mares*, 402 F.3d at 519-20; *United States v. Alonzo*, 435 F.3d 551, 553-54 (5th Cir. 2005). Okoro has failed to rebut this presumption and we find that the sentence was reasonable.

B.

In considering Okoro's other claimed points of error, we find no errors under the applicable standards of review. Therefore, we affirm.

AFFIRMED.

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3. Okoro contends that his sentence is a "non-Guideline" sentence and, as such, the district court was required to thoroughly articulate its reasons for departing from the Guidelines. *See Smith*, 440 F.3d at 707. Because we find the sentence properly calculated under the Guidelines we need not address this argument.

APPENDIX B — EXCERPTS OF REVISED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED APRIL 29, 2005, FILED APRIL 14, 2005

REVISED APRIL 29, 2005

No. 03-20875

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERNEST NDA AKPAN; CHIJIOKE VICTOR OKORO, M.D., also known as Victor Okoro, also known as Chiji V. Okoro,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

(H-01-CR-399-2)

Before WIENER and PRADO, Circuit Judges, and LITTLE,* District Judge.

WIENER, Circuit Judge:

Defendant-Appellant Ernest Nda Akpan appeals his conviction and sentence after a jury trial for mail fraud in violation of 18 U.S.C. § 1341. Defendant-

* District Judge of the Western District of Louisiana, sitting by designation.

Appendix B

Appellant Chijioke Victor Okoro appeals his conviction and sentence after a jury trial for fifteen counts of mail fraud in violation of 18 U.S.C. § 1341, three counts of filing false tax returns in violation of 26 U.S.C. § 7206(1), and seven counts of healthcare fraud in violation of 18 U.S.C. § 1347. Finding no error in the district court's rulings or the jury trial, we affirm Akpan's and Okoro's convictions. We also affirm Akpan's sentence, but, in light of the Supreme Court's opinion in United States v. Booker[1] and our recent opinion in United States v. Mares,[2] we vacate Okoro's sentence and remand for resentencing.

I. FACTS AND PROCEEDINGS

Doctor Okoro is a native of Nigeria who came to the United States to attend college in the 1970s. He received an undergraduate degree in chemistry and graduated from medical school. As a licensed physician, Okoro practiced medicine in the United States from 1981 until 2002. He also developed a medical missionary program to bring medical care to his native Nigeria. Between 1984 and 2000, Okoro traveled to Nigeria twice a year to provide medical care to impoverished Nigerians. In 1989, Okoro moved to Houston, Texas to work as an emergency room doctor at Memorial Hospital Northwest ("Memorial"). In 1990, Memorial promoted him to the Director of the Emergency Department, a position that he held until his arrest. In 1999, Okoro became a United States citizen.

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1. __ U.S. __, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

2. 402 F.3d 511 (5th Cir.2005).

Appendix B

A. Mail Fraud

Okoro also worked for the Westchase Clinic ("Westchase") until it closed in 1995, when he began work for Westchase's successor, Spectrum Medical Clinic ("Spectrum"). Okoro and Akpan worked together at both Westchase and Spectrum. In 1996, Spectrum was dissolved and became Houston Medcare ("Medcare"), a minor injury clinic owned by Okoro. Many of Spectrum's employees joined Okoro at Medcare. Most importantly, Okoro hired Akpan as Medcare's administrator to work with lawyers and insurance company representatives to ensure that the clinic received payment for the services that it rendered. Akpan coordinated the transfer of patients from Spectrum to Medcare and also supervised Spectrum's office staff.

In March 1996, the Federal Bureau of Investigation ("FBI"), the Internal Revenue Service ("IRS"), and the United States Department of Health and Human Services ("DHHS") began to investigate attorneys and physicians suspected of submitting false claims to insurance companies for non-existent medical services purportedly provided to victims of motor vehicle accidents. The results of the undercover investigation by FBI Special Agent Lorraine Tucker and Houston Police Officer Sheryl Jefferson reveals the fraudulent scheme alleged by the government in the indictment against Okoro and Akpan.

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Appendix B

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B. Healthcare Fraud[4]

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The evidence at trial demonstrated that many of the physical therapy clinics billed Medicare for services that Okoro allegedly rendered after he deactivated his individual provider number for that clinic. In addition, Okoro signed patient documents that stated that he had treated those patients on

4. Okoro does not appeal his conviction for tax fraud.

specific dates and at specific times on which Okoro could not possibly have rendered services. For example, many of the dates on which Okoro alleged that he provided services were dates when he was in Nigeria.

C. Indictment and Trial

In May 2001, a federal grand jury returned a 22-count indictment against Okoro and Akpan. The following February, a grand jury returned a 25-count second superceding indictment against Okoro, Akpan, as well as counts against Claudia Ramon, Guadalupe Castro, and Ana Lilia Garcia. The district court severed the charges against these additional defendants before trial, and they are not a subject of this appeal. Counts one through 15 of the second superceding indictment charged Okoro with aiding and abetting mail fraud in violation of 18 U.S.C. §§ 1341 and 2. Counts 16 through 18 charged Okoro with filing false federal income tax returns in violation of 26 U.S.C. § 7206(1). Counts 19 through 25 charged Okoro with health care fraud in violation of 18 U.S.C. § 1347. Count One charged Akpan with mail fraud in violation of 18 U.S.C. § 1341.

Trial against Okoro and Akpan began in September 2002. After deliberating, the jury found Okoro guilty on all twenty-five counts and found Akpan guilty on Count One.

* * *

Appendix B

F. Okoro's Sentence

Okoro asserts several challenges to his sentence. Specifically, he contends that under United States v. Booker,[48] the district court erred when it calculated the amount of loss attributable to him under United States Sentencing Guidelines ("U.S.S.G.") § 2F1.1.[49] Okoro also challenges the district court's application of U.S.S.G. § 2F1.1(b)(8)(B), pursuant to which the district court enhanced Okoro's base offense level by four levels because he had deprived one or more financial institutions of more than one million dollars. In his supplemental Rule 28(j) letter to this court, Okoro also challenges the district court's enhancement of his base offense level by: (1) four levels for being a leader/organizer of the criminal activity; (2) two levels for more than minimal

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48. __ U.S. __, 125 S.Ct. 738, 160 L.Ed.2d 621 (Jan. 12, 2005).

After the Supreme Court handed down Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, both appellants raised Blakely challenges to their sentences in a Rule 28(j) letter to this court. When the Supreme Court decided Booker, we ordered the parties to brief its effect on their sentences. Thus, because Booker specifically applies to the U.S.S.G., we refer to each appellant's challenge to his sentence as a Booker challenge.

49. The district court increased Okoro's base offense level by 14 levels based on a total loss of between five and ten million dollars. The indictment alleged a total loss of $75,408.47.

planning; and (3) two levels for abuse of his position of trust.[50]

The Supreme Court made clear in Booker that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to the jury beyond a reasonable doubt."[51] The government argues that Okoro has not properly preserved his Booker objection and that we should review Okoro's challenge for plain error.[52] Okoro did not, however, fail to preserve his Booker challenge to the district court's loss calculation. Our review of Okoro's pre-sentencing objections to the Presentence Investigation Report ("PSR") and his objections during his sentencing reveal that Okoro repeatedly objected to the district court's determination of a range of financial loss between five and ten million dollars on the ground that that figure had not been proven at trial. Okoro also consistently urged that the district court confine its determination of loss to the amount alleged in the indictment. Although Okoro never explicitly

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50. Okoro also contends that the district court erred when it specified that his 31-month sentence for tax fraud should run consecutively to his 120-month sentence for mail and healthcare fraud. As we remand for resentencing in light of Booker, we need not and therefore do not reach this challenge.

51. 125 S.Ct. at 756.

52. *See United States v. Mares*, 402 F.3d 511, 519-20, 2005 WL 503715, at *7-8 (5th Cir.2005).

mentioned the Sixth Amendment, Apprendi, or Blakely until his Rule 28(j) letter, we are satisfied that his objections adequately apprised the district court that Okoro was raising a Sixth Amendment objection to the loss calculation because the government did not prove to the jury beyond a reasonable doubt that the loss was between five to ten million dollars.[53] When, as here, a defendant preserves his error, "we will ordinarily vacate the sentence and remand, unless we can say the error is harmless under Rule 52(a) of the Federal Rules of Criminal Procedure."[54]

We recognize that several circuit courts appear to be taking divergent positions on the question

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53. *See, e.g., United States v. Selwyn*, 398 F.3d 1064, 1066-67 (8th Cir.2005) (noting, in case involving Sixth Amendment violation, that defendant preserved error by objecting to drug quantity findings); *United States v. Fox*, 396 F.3d 1018, 1027 (8th Cir.2005) (noting, in case involving Sixth Amendment violation, that Booker objection to drug quantity finding in supplemental pro se brief preserved error).

We recognize, as have other circuits, that there exists some question "whether, in cases not involving a Sixth Amendment violation, there must be an objection to the mandatory nature of the guidelines in order to preserve that error on appeal, or whether a general objection to the sentence imposed under the guidelines is sufficient to preserve a *Booker* challenge." *United States v. Sayre*, 400 F.3d 599, 599-600 (8th Cir.2005). Because a pure *Booker* Sixth Amendment violation occurred here, however, we need not-and do not-resolve this debate.

54. *Mares*, 402 F.3d 511, 520 n. 9, 2005 WL 503715, at *7 n. 9.

whether a harmless error analysis applies when a Sixth Amendment violation occurs.[55] Were we to review Okoro's sentence for harmless error, however, we would find that here the error was harmful.[56] Harmless error is "[a]ny defect, irregularity, or variance that does not affect substantial rights" of the defendant,[57] and "arises when the mistake fails to prejudice the defendant."[58] "Prejudice occurs when the

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55. For example, the Sixth Circuit seems to intimate that a harmless error analysis is not required when a constitutional violation occurs. *See, e.g., United States v. Oliver*, 397 F.3d 369, 381 (6th Cir.2005) (noting in a case where defendant failed to preserve error that "[h]aving concluded that the district court's sentencing determinations in this case plainly violate the Sixth Amendment, we need not consider whether such an error is harmless."). The Sixth Circuit's position finds support in the last sentence of the remedial *Booker* opinion. 125 S.Ct. at 769 ("It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine.").

On the other hand, the District of Columbia Circuit appears to assume that *Booker* challenges are "governed by the harmless error standard appropriate for constitutional error . . . ." *United States v. Coumaris*, 399 F.3d 343, 350 (D.C.Cir.2005).

56. *Mares*, 402 F.3d 511, 520 n. 9, 2005 WL 503715, at *7 n. 9.

57. Fed.R.Crim.P. 52(a).

58. *United States v. Munoz*, 150 F.3d 401, 413 (5th Cir.1998) (citing *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

error 'ha[s] affected the outcome of the district court proceedings.' "[59] The government must bear the burden of demonstrating that the error was harmless[60] by demonstrating beyond a reasonable doubt that the federal constitutional error of which a defendant complains did not contribute to the sentence that he received.[61]

The government cannot meet this burden here. It can point to no record evidence that would prove beyond a reasonable doubt that the district court would not have sentenced Okoro differently had it acted under an advisory Guidelines regime. Based on the record before us, we cannot say that the mandatory nature of the Guidelines at the time of Okoro's sentence did not contribute to the sentence that he received. Accordingly, we vacate Okoro's sentence and remand for resentencing.[62]

G. Akpan's Sentence

Akpan also challenges his sentence on Booker grounds. Specifically, Akpan argues that the district

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59. *Id.*

60. *See id.*

61. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

62. Because we vacate and remand Okoro's entire sentence, we need not and do not reach his other arguments of sentencing errors; rather, we leave to the discretion of the district court, whether in its discretion, it will impose the identical sentence with the identical departures or enhancements, or both.

court violated Booker when it calculated the loss and increased his sentence based on an amount of loss not found by the jury nor admitted by him. Akpan also argues that the district court violated his right to trial by jury when it increased his base offense level by two levels for more than minimal planning and by three levels for a leadership role in the offense. The government counters that Akpan has not preserved his Booker challenge as he raised it for the first time on appeal. Our review of the record demonstrates that this contention is accurate. Akpan did not couch his arguments in the district court as to the loss calculation in the same terms as Okoro. Thus, we review Akpan's sentence for plain error.[63]

Under the plain error test, we may not correct an error that the defendant has failed to preserve unless there is "(1) error, (2) that is plain, and (3) that affects substantial rights."[64] Even if the defendant carries his burden as to these three factors, however, we will not correct the error unless "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."[65]

Under *Mares*, Akpan passes the first two requirements for plain error,[66] but he fails the third.

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63. *Mares*, 402 F.3d 511, 519-20, 2005 WL 503715, at *7-8.

64. *United States v. Cotton*, 535 U.S. 625, 631, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

65. *Id.*

66. 402 F.3d 511, 520, 2005 WL 503715, at *8.

To demonstrate that the error affected his substantial rights, Akpan had to show that the error affected the outcome of the district court proceedings.[67] Thus, the defendant, rather than the government, bears the burden here.[68] Akpan must "demonstrate a probability 'sufficient to undermine confidence in the outcome.' "[69]

Under *Mares*, Akpan cannot satisfy his burden. He cannot demonstrate that the district judge-sentencing under an advisory rather than a mandatory Guidelines regime-would have sentenced him differently.[70] The record does not contain anything to reflect what the district court would have done had it sentenced Akpan under an advisory Guidelines regime. The district court made no remarks on the record to indicate that (1) it was bound by the Guidelines, (2) it felt constrained by the Guidelines to sentence Akpan in the way that it did, or (3) it would have sentenced him differently if it had had the discretion to do so. In the total absence of any such language, Akpan cannot carry his burden on the third prong of the plain-error test.

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67. *See id.* (quoting *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

68. *Olano*, 507 U.S. at 734, 113 S.Ct. 1770.

69. *United States v. Dominguez-Benitez*, 542 U.S. 74, 124 S.Ct. 2333, 2340, 159 L.Ed.2d 157 (2004).

70. *Mares*, 402 F.3d 511, 521-22, 2005 WL 503715, at *9.

Akpan also contends that the district court erred when it did not state the reasons for imposing his particular sentence under 18 U.S.C. § 3553(c)(1). As Akpan failed to object to the district court's failure to state its reasons for imposing his particular sentence, our review is again for plain error.[71]

Under 18 U.S.C. § 3553(c), "[i]f a defendant's guidelines sentencing range exceeds twenty-four months, the district court must state in open court its reasons for the particular sentence that it has imposed."[72] Akpan argues that the district court failed to state its reasons in open court for imposing a 41-month sentence as to Count One.

Based on a total offense level of 21 and a criminal history category of I, the district court determined that Akpan's guideline range was between 37 to 46 months imprisonment. "Although 18 U.S.C. § 3553(c) requires the sentencing judge to state in open court the reasons for its imposition of the particular sentence . . . the district court need not provide reasons for imposing a sentence at a particular point within the [applicable Guidelines range] if this range is less than twenty-four months."[73] Here, Akpan's guideline

71. *United States v. James*, 46 F.3d 407, 407-08 (5th Cir.1995).

72. *Id.* at 407 (citing 18 U.S.C. § 3553(c)(1)).

73. *United States v. Pippin*, 903 F.2d 1478, 1484-85 (11th Cir.1990) (citations and quotations omitted). *See also United States v. Richardson*, 925 F.2d 112, 117 (5th Cir.1991) ("Following the reasoning in *United States v.*

(Cont'd)

range did not span a range of twenty-four months. His argument is therefore without merit. We affirm Akpan's sentence.

III. CONCLUSION

For the foregoing reasons, we AFFIRM both Okoro's and Akpan's convictions, as well as Akpan's sentence. In light of Okoro's preservation of Sixth Amendment error, however, we VACATE his sentence and remand for resentencing.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

(Cont'd)

Ehret, 885 F.2d 441 (8th Cir.1989), *cert. denied*, 493 U.S. 1062 110 S.Ct. 879, 107 L.Ed.2d 962 (1990), we find that when the spread of an applicable Guideline range is less than 24 months, the district court is not required to state its reasons for imposing a sentence at a particular point within the Guideline range.").

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No. 06-1375

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CHIJIOKE VICTOR OKORO, AKA VICTOR OKORO AKA CHIJI V. OKORO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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No. 06-1375

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that, on review pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), a federal court of appeals should not treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable. On November 3, 2006, this Court granted certiorari in *Claiborne* v. *United States*, No. 06-5618, and *Rita* v. *United States*, No. 06-5754, to address various aspects of sentencing procedure under *Booker*, including, in *Rita*, whether it is consistent with *Booker* to accord a presumption of reasonableness to within-Guidelines sentences. Accordingly, the petition for a writ of certiorari should be held pending the Court's resolution

of *Claiborne* and *Rita*, and then disposed of as appropriate in light of the decisions in those cases.*

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MAY 2007

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* The government waives any further response to the petition unless this Court requests otherwise.